Supreme Court, U.S.
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No. 02-855

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in state court unless, *inter alia*, the state court's decision was "contrary to" clearly established federal law as determined by this Court, 28 U.S.C. § 2254(d)(1), or was based upon an "unreasonable" determination of the facts in light of the evidence presented in the state proceeding, § 2254(d)(2). Further, the state court's determination of factual issues "shall be presumed correct" unless rebutted by "clear and convincing evidence." § 2254(e)(1).

The Questions Presented are:

1. May a federal habeas corpus court reject a state court's factual determinations because it has a "firm conviction," after conducting its own review of the state court evidentiary record, that the state court's findings were "wrong?"

2. Did the Ninth Circuit err under *Early v. Packer*, 123 S.Ct. 362 (Nov. 4, 2002), by rejecting the state court's adjudication of the merits of the prisoner's claim as "contrary to" clearly established federal law merely because the state court did not expressly cite or apply federal law in its decision?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

George M. Galaza, Warden of the State Prison at Corcoran, California (the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 297 F.3d 911 (9th Cir. 2002). The order of the United States District Court for the Central District of California is unreported. Both are reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on July 22, 2002. Appendix C. The State's petition for rehearing and suggestion for rehearing en banc was denied on August 30, 2002. Appendix B. The jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(e)(1) of Title 28 of the United States Code provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The prosecution's evidence at respondent Jesus Avila's criminal trial established that, on the afternoon of August 19, 1990, five Black teenagers left a birthday party in Lynwood, California, and walked to nearby Ham Park to "hang out." Avila and another Hispanic man approached and asked their gang affiliation. The boys explained that they did not know anything about gangs in Lynwood. One of the boys asked Avila where he had gotten his gang tattoos. Avila responded that he would be right back with "the dude who does the tattoos." Avila returned with a group of thirty to forty male Hispanics who angrily confronted the boys about their presence in the park. When a Hispanic male "socked" one of the teenagers, the boys fled across the park. Meanwhile, Avila, who had slipped away during the confrontation, returned with a gun and followed. Avila fired his gun several times and hit one of the boys, Demetrius Kidd, in the back of the head. Police officers arrived within minutes. Kidd and another boy, Romel Johnson, independently identified Avila as the shooter in field show-ups and at trial.

The defense presented evidence of a complete alibi. Avila and three other witnesses testified that he had played no role in the shooting and was elsewhere in the park at the time it occurred.

The jury rejected Avila's alibi defense, convicted him of attempted first-degree murder, and found true the special allegations that he personally used a firearm during the commission of the offense and that he inflicted great bodily injury on his victim. The trial court sentenced Avila to state prison for life with the possibility of parole, plus eight years.

Avila appealed the judgment and concurrently sought state habeas corpus relief alleging, *inter alia*, that trial counsel was constitutionally ineffective for failing to investigate and present additional alibi witnesses and evidence regarding the third party culpability of Avila's brother, Ernesto, who, over two years after trial, claimed responsibility for the shooting. The

California Court of Appeal issued an order referring Avila's habeas matter to the Los Angeles County Superior Court for the taking of evidence and finding of fact. Appendix K. While the habeas case was pending, the California Court of Appeal affirmed Avila's judgment of conviction and sentence on direct appeal. Appendix L.

Thereafter, Judge William Pounders, the appointed superior court referee, held a 10-day evidentiary hearing during which he heard the testimony of 23 witnesses and the argument of counsel. Judge Pounders issued a 19-page referee's report that summarized the evidence and detailed his factual findings, including his credibility determinations of key defense and prosecution witnesses. Appendix J. Specifically, Judge Pounders determined that the new alibi witnesses would have been cumulative to those who gave Avila a complete alibi defense at trial, that the new witnesses who identified Ernesto as the shooter were not credible for reasons such as their relationship with Avila and their remote location in the park at the time of the shooting, and that none of the new witnesses would have been available to testify at trial — including Ernesto who, prior to trial, had claimed he was not even at the park when the shooting occurred. On the other hand, Judge Pounders determined that prosecution witness Romel Johnson, who had positively identified Avila as the shooter at the scene, at trial, and at the reference hearing, was "an exceptionally persuasive witness" whose "compelling testimony . . . was an obstacle [trial counsel] could not overcome." Appendix J at 123-26, 128-30.

The California Court of Appeal, after examining the transcripts of the hearing and considering the referee's report, adopted Judge Pounders' factual and credibility findings and denied Avila's petition. Appendix I. State court proceedings concluded on February 24, 1994, when the California Supreme Court denied Avila's final state petition for habeas corpus relief. Appendix H.

On December 3, 1997, Avila filed a federal habeas corpus petition re-alleging the ineffective assistance of counsel claims

rejected by the state courts. After several rounds of briefing, the magistrate concluded that the state court's rejection of Avila's claims was neither "contrary to, or an unreasonable application of clearly established Federal law" nor "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and recommended that the petition be denied with prejudice. Appendices F & G. The district judge adopted the magistrate's recommendation and entered judgment against Avila on November 1, 2000. Appendices D & E.

Petitioner appealed to the Ninth Circuit. That court determined that it could reach the merits of Avila's claims and grant relief for two reasons. One, the state referee's report did not cite or apply this Court's precedent and therefore was automatically "contrary to" federal law under § 2254(d)(1). Appendix C at 14. Two, "the referee's factual findings were 'clearly erroneous,' [under § 2254(e)(1)] such that [the Ninth Circuit panel was] left with 'a firm conviction' that the determination made by the state court was wrong and that the one [Avila] urges was correct." Appendix C at 15. In granting relief, the Ninth Circuit reviewed the same state court record but reached conclusions diametrically opposed to those reached by Judge Pounders. The Ninth Circuit panel opined that the defense witnesses were credible and not cumulative and that all of them were available at the time of trial - including Ernesto, who the court inferred would have confessed to the crime at trial if defense counsel had asked. Appendix C at 24-27, 29 & nn. 12-14.

On remand following the Ninth Circuit's denial of the State's petition for rehearing and suggestion for rehearing en banc, the district court entered judgment ordering the State to release Avila unless he is retried by January 6, 2003. Appendix A. No stay is currently in effect.

REASONS FOR GRANTING CERTIORARI

QUESTION 1

THIS CASE PRESENTS AN IMPORTANT QUESTION OVER WHICH THE FEDERAL COURTS ARE IN DISARRAY: THE RELATIONSHIP OF 28 U.S.C. §§ 2254(D)(2) AND (E)(1) AND THE STANDARD BY WHICH A FEDERAL HABEAS COURT MUST REVIEW A STATE COURT'S CREDIBILITY AND FACTUAL FINDINGS

Before Congress overhauled the federal habeas corpus statutes by enacting the AEDPA in 1996, 28 U.S.C. § 2254(d) contained no provision requiring deference to a state court's "reasonable" factual determinations. Rather, former § 2254(d) prescribed a presumption of correctness conditioned by a host of contingencies and exceptions. Appendix M. In stark contrast, current § 2254(d) *precludes* the grant of federal habeas corpus relief to a state prisoner except, *inter alia*, where the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). And § 2254(e)(1) deleted the contingencies and exceptions of former § 2254(d) and now provides simply that a state court's factual determinations "shall be presumed correct" unless the prisoner carries the heavy burden "of rebutting the presumption of correctness by clear and convincing evidence."

The Ninth Circuit ignored the significant changes wrought by the AEDPA in evaluating the state court's decision in this case. While the Ninth Circuit made glancing references to §§ 2254(d)(2) and (e)(1), it actually applied a standard of review more in keeping with former § 2254(d). Instead of viewing the state court's factual and credibility determinations as

presumptively correct and holding Avila to his burden of rebutting that presumption with clear and convincing evidence as required by § 2254(e)(1), the Ninth Circuit employed a "firm conviction" standard of review — a standard not found in the AEDPA but described as involving a determination that the state court was "wrong" and Avila "correct" — to reject the state court's factual and credibility determinations in favor of conclusions reached as the result of its independent review of the same state court record.[3]

The so-called "firm conviction" standard, as applied by the Ninth Circuit, allows a federal court to grant habeas corpus relief to a state prisoner based on an independent determination that the state court's factual findings were incorrect whether or not the prisoner presented clear and convincing evidence to rebut the presumption of correctness and without regard for whether the state court's factual findings were reasonable in light of the evidence presented to it. It is untethered to the AEDPA and constitutes an impermissible expansion of the power federal courts currently have to grant habeas corpus relief to state prisoners.

Two examples make the point. Terri Clark testified at the evidentiary hearing. She alleged an alibi for Avila and identified his brother, Ernesto, as the shooter. Judge Pounders rejected Clark's testimony as not credible based on her long-term friendship with Avila, her failure to tell the defense investigator that Ernesto was the shooter, and the fact that two witnesses standing near the area where she was standing when she allegedly saw the shooting testified that they could not see the shooting or even tell the direction from which the shots were fired. Three other witnesses, Alice Dominguez, Marcella Riboni, and Angela Espinoza, provided testimony similar to that

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3. The Ninth Circuit apparently borrowed its "firm conviction" standard from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in which this Court explained that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

of Clark. Judge Pounders discounted their testimony as well because, like Clark, they could not have seen the shooting from their locations in the park. Appendix J at 118-21, 126-29.

Avila's brother, Ernesto, also testified at the evidentiary hearing. He claimed that he fired a couple of shots at the Black teenagers, but did not see anyone fall as a result. Judge Pounders determined that Ernesto had been unavailable to give his testimony at trial because he had told Avila's trial investigator he was not at the park when the shooting occurred, and because none of the witnesses contacted during the investigation identified Ernesto as the shooter. Judge Pounders further determined that any self-incriminating information to the contrary that Ernesto may have given to his own attorney and defense investigator was confidential and would not have been revealed to Avila's trial counsel if he had inquired. Appendix J at 110-11, 124-25. Two state appellate courts, a federal magistrate judge and a federal district court judge properly deferred to these factual and credibility findings. The Ninth Circuit, however, did not. Rather, upon independent review of the state court record — the record created at the hearing over which Judge Pounders personally presided — the Ninth Circuit determined that Judge Pounders' credibility and factual determinations were "wrong." While purporting "not [to] denigrate the role of the fact-finder in judging credibility when [reviewing] the record in hindsight," the Ninth Circuit rejected Judge Pounders' negative credibility determinations as lacking "factual basis" in the record or having been rebutted by "clear and convincing evidence to the contrary." But the Ninth Circuit did not point to anything other than its own speculative reinterpretation of the record to support these conclusions. Appendix C at 21-23 & nn.12-14.

Perhaps most inexplicably, the Ninth Circuit rejected Judge Pounders' determination that Ernesto was not available to testify at trial. In the Ninth Circuit's view, Ernesto "might have come forward – or at least made an inculpatory statement that could have been used against him at trial" if only he had been asked to do so by Avila's trial counsel. Appendix C at 25; *see*

also Appendix C at 24. There is absolutely no support in the record for this counterintuitive conclusion. Certainly, Ernesto never testified that he would have incriminated himself at trial. To the contrary, the evidence shows that Ernesto knew his brother was being tried for attempted murder, that no witnesses at trial identified him (Ernesto) as the "real" shooter, and that Ernesto nonetheless chose to stick to the story that he was not even in the park when the shooting occurred.

As these examples demonstrate, the Ninth Circuit's application of the so-called "firm conviction" standard of review allowed it to reject Judge Pounders' credibility and factual determinations - and grant Avila relief - simply because it chose to draw different inferences and conclusions from the cold transcripts of the state evidentiary hearing record. The Ninth Circuit panel's decision, and the standard of review from which it derived, is wholly incompatible with the AEDPA.

First, the Ninth Circuit's "firm conviction" standard does not truly effectuate the presumption of correctness or require the prisoner to rebut the presumption with clear and convincing evidence. Although the Ninth Circuit asserted that the state court record contained clear and convincing evidence contrary to several of Judge Pounders' findings, a fair reading of the record demonstrates that the Ninth Circuit made such assertions based on its re-interpretation and re-evaluation of ambiguous or conflicting testimony. But testimony that is ambiguous or conflicting does not constitute clear and convincing evidence sufficient to rebut the presumption of correctness. *Seymour v. Walker*, 224 F.3d 542, 551-52 (6th Cir. 2000). As this Court explained long ago, evidence is clear and convincing only if it "does not leave the issue in doubt." *Schneiderman v. United States*, 320 U.S. 118, 141 (1943). The Ninth Circuit's mere assertion that clear and convincing evidence rebutted Judge Pounders' credibility and factual findings does not satisfy this "heavy burden." *Id.; and see Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) ("latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever make clear and convincing showing" necessary to establish innocence of death

penalty).

The immutability of this conclusion is all the more apparent when the "special deference" owed to a state court's credibility findings is considered. As was well-established under pre-AEDPA law, "federal habeas courts [had] no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Rather, federal habeas courts owed a "special deference" to a state court's credibility findings. *Patton v. Young*, 467 U.S. 1025, 1038 (1984). The AEDPA did not vitiate this rule of law. It strengthened the rule by making it more difficult for a federal habeas court to jettison a state court's credibility findings. *See, e.g., Sanna v. DiPaolo*, 265 F.3d 1, 10 (1st Cir. 2001).

Second, the Ninth Circuit's "firm conviction" standard does not require an inquiry into the reasonableness of the state court's factual determinations. Instead, application of the "firm conviction" standard allowed the Ninth Circuit to skirt the reasonableness inquiry and grant relief based solely on its independent determination that the state court's factual determinations were wrong. However, as this Court has explained in conjunction with the reasonableness provision of § 2254(d)(1), a "wrong" decision is not the same as an "objectively unreasonable" one. *Williams v. Taylor*, 529 U.S. 362, 410-13 (2000); *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002). "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. at 411. It logically follows that the same distinction between "wrong" and "objectively unreasonable" must be made vis-a-vis § 2254(d)(2)'s "reasonable determination of the facts" clause. A federal habeas court may not issue the writ simply because it concludes in its independent judgment that the relevant state court decision was based on factual determinations that are

wrong – the state court's decision must also be *objectively unreasonable*. The Ninth Circuit's "firm conviction" standard ignores this distinction and eviscerates the reasonableness inquiry by allowing a grant of relief to rest solely on a determination that the state court's factual determination was wrong.[4]

As the foregoing examples demonstrate, and as the Ninth Circuit has candidly acknowledged, "the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear." *Green v. White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000). There is no consensus among the other federal circuits regarding the relationship between these provisions or the standard by which a federal court must review a state court's factual determinations. While it is generally acknowledged that the AEDPA requires increased deference to a state court's factual findings, *Carter v. Lee*, 283 F.3d 240, 251 (4th Cir. 2002) (referring to the "deferential standard of review established by AEDPA and embodied in § 2254(e)(1)"); *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) ("§ 2254(e)(1) provides for a highly deferential standard of review for factual determinations made by a state court"); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) ("AEDPA increases the deference federal courts must give to the factual findings . . . of the state courts"), the exact nature of the relationship between §§ 2254(d)(2) and (e)(1) has proved elusive, *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001) (harmonizing §§ 2254(d)(2) and (e)(1) as separate aspects of new factual deference inquiry); *id.* at 965-68 (Dennis, J., dissenting) (interpreting §§ 2254(d)(2) and (e)(1) to yield a result similar to pre-AEDPA law); 17A Wright et al. FEDERAL PRACTICE AND PROCEDURE, § 4265.2 (Supp. 2001) ("It is not clear how this invitation to decide whether the state

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4. A closely related issue is currently pending before this Court in *Lockyer v. Andrade*, case number 01-1127, *i.e.*, whether a federal habeas court may first address the correctness of a state court's legal determination before considering whether it was contrary to, or involved an unreasonable application of, clearly established federal law.

fact determinations were reasonable will fit with the presumption that the state fact determinations are correct"), and has thus far precluded articulation of a standard of review that embodies the heightened deference contemplated by the AEDPA, *Green v. White,* 232 F.3d at 672 n.3 (unclear relationship of §§ 2254(d)(2) and (e)(1) need not be defined because "standard of review appears to be clear error under both statutory provisions"). In fact, notwithstanding that heightened deference, some circuits appear entirely ready to interpret §§ 2254(d)(2) and (e)(1) pursuant to pre-AEDPA standards such as those found in former §§ 2254(d)(6) and (d)(8). *Scarbrough v. Johnson*, 300 F.3d 302, 305 (3d Cir. 2002) ("a federal court must presume that state court findings of fact are correct, unless they are not fairly supported by the record"); *Simmons v. Luebbers,* 299 F.3d 929, 942 (8th Cir. 2002) ("'the factual findings of state courts are presumed to be correct, and may be set aside . . . only if they are "not fairly supported by the record"'"); *Yung v. Parker,* 296 F.3d 129, 137 (2d Cir. 2002) (referring to the focus of § 2254(d)(2) as "whether the court's factual findings are supported by sufficient evidence"); *Valdez v. Cockrell*, 274 F.3d at 965-68 (Dennis, J., dissenting) (reading §§ 2254(d)(2) and (e)(1) *in pari materia* yields results similar to those reached by former § 2254(d)(6)).

The Ninth Circuit's application of the so-called "firm conviction" standard of review in this case and the general confusion among the federal circuits regarding the relationship between §§ 2254(d)(2) and (e)(1) raise an important question of federal law: By what standard must a federal habeas court review a state court's credibility and factual determinations? Sections 2254(d)(2) and (e)(1) are the means by which Congress attempted to protect the reasonable factual determinations of the state courts. Unless the heightened factual deference contemplated by these provisions is acknowledged and effectuated, standards of review untethered to the AEDPA will proliferate and impermissibly expand the power of the federal courts to grant habeas corpus relief to state prisoners.

QUESTION 2

THE NINTH CIRCUIT'S DETERMINATION THAT THE STATE COURT'S DECISION WAS "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW BECAUSE IT DID NOT CITE OR APPLY THIS COURT'S PRECEDENT IS INSUPPORTABLE GIVEN *EARLY v. PACKER*

The Ninth Circuit designated the referee's report as the operative state court decision in this case and then found it "contrary to" federal law because it "did not cite any law, much less controlling Supreme Court precedent." Appendix C at 14. The validity of this holding was highly suspect at the time it issued given its lack of support in the plain language of the statute and its inconsistency with the majority of the federal courts of appeals. Any question of its complete invalidity has since been put to rest. As the Court explained in *Early v. Packer*, 123 S.Ct. 362, 365 (Nov. 4, 2002), the Ninth Circuit's interpretation of the "contrary to" clause is wrong. Accordingly, just as in *Packer*, the Ninth Circuit's error in this case should be reversed.

CONCLUSION

For all of these reasons, the State respectfully asks the Court to grant the petition for writ of certiorari.

Dated: November 25, 2002

Respectfully submitted,

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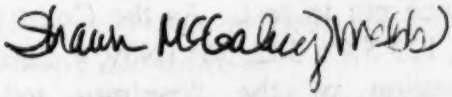

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